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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Robin Fleck, an individual,

10 Plaintiff,

11 v.

12 Quality Loan Service Corporation, trustee,
13 and American Home Mortgage Servicing,
14 Inc., Servicer, and Citibank N.A. as Trustee
15 for Merrill Lynch Mortgage Investors Trust,
16 Mortgage Loan Asset-Backed Certificate,
17 Series 2007-HE2 by American Home
18 Mortgaging Servicing, Inc. Successor in
19 Interest to Option One Mortgage
Corporation as attorney-in-fact; Quality
Loan Service Corporation; American Home
Mortgage Servicing Inc., its assigns and or
successors in interest, and Does 1-20,

20 Defendants.

21 No. CV-10-8256 PCT-DGC

22 **ORDER**

23 Defendants have filed two separate motions for attorneys' fees, costs, and
24 expenses, the first to recover fees of \$7,626.50 incurred in responding to Plaintiff's
25 motion to strike, and the second to recover attorneys' fees of \$70,893.55, taxable costs of
26 \$350, and non-taxable expenses of \$2,137.06 incurred in successfully defending against
27 this lawsuit. Docs. 55, 59. The motions are fully briefed. Docs. 55, 59, 61, 62, 63. No
28 party has requested oral argument. Defendants' motion for fees incurred in defeating the
motion to strike will be granted against Plaintiff's counsel. Defendants' motion for fees,
costs, and expenses incurred in defending against this lawsuit will be denied.

1 **I. Background.**

2 Plaintiff Robin Fleck filed suit on November 10, 2010, seeking compensatory and
3 punitive damages for intentional misrepresentation and consumer fraud, an accounting of
4 the proceeds from a foreclosure sale, and a declaration of quiet title. Doc. 1, ¶¶ 21-61.
5 Defendants filed a motion for summary judgment which was granted on May 5, 2012.
6 Docs. 33, 57. After the summary judgment motion was filed, Plaintiff filed a motion to
7 strike and for sanctions. Doc. 37. That motion was denied on April 27, 2012. Doc. 54.

8 **II. Legal Standards.**

9 A.R.S. § 12-349(A) provides that a court “shall” award attorneys’ fees and
10 expenses, and, in its discretion, double damages not to exceed \$5,000, against a party or
11 attorney who (1) brings a claim without substantial justification, (2) brings an action
12 solely for the purpose of harassment, (3) unreasonably expands or delays the proceedings,
13 or (4) engages in discovery abuse.

14 A.R.S. § 12-341.01(A) provides that, “[i]n any contested action arising out of a
15 contract, express or implied, the court may award the successful party reasonable attorney
16 fees.” The trial court has broad discretion regarding the amount of fees awarded, and
17 may use its discretion to deny fees or to award any amount up to the amount paid or
18 agreed to be paid. A.R.S. § 12-341.01(B); *see also Wilcox v. Waldman*, 744 P.2d 444,
19 450 (Ariz. Ct. App. 1987).

20 **III. Plaintiff’s Motion to Strike and for Sanctions.**

21 Plaintiff’s motion to strike made various arguments against Defendants: their
22 written discovery responses were untimely, the responses violated Rule 11, the responses
23 were not verified by proper corporate representatives, and Defendants failed timely to
24 disclose a corporate representative. Doc. 37. Plaintiff sought serious sanctions, including
25 that the responses be stricken, the requests for admission be deemed admitted, and
26 financial sanctions be awarded against Defendants. *Id.* Defendants responded with a
27 point-by-point rebuttal showing, for several reasons on each point, that Plaintiff’s motion
28 was simply wrong. Doc. 41. Plaintiff filed nothing in reply. The Court’s order denying

1 Plaintiff's motion found that it was legally and factually incorrect and that Plaintiff had
2 failed to comply with the case management order in this case and Federal Rule of Civil
3 Procedure 11. Doc. 54. The Court stated that it was inclined to enter an award of
4 attorneys' fee against Plaintiff or her counsel for filing the motion, but concluded that
5 they should be given an opportunity to respond before such an award was granted. The
6 Court accordingly required that the parties brief the issue. *Id.*

7 Defendants' subsequent motion for attorneys' fees argued that the deficiencies in
8 Plaintiff's motion evidenced bad faith motives to harass and cause Defendants to incur
9 unnecessary legal fees. Doc. 55. Plaintiff filed a 12-page response that discussed the
10 mortgage crisis in America, the enormous number of foreclosures instituted by lenders,
11 the failure of the courts to provide justice to borrowers, and the fact that summary
12 judgment in this case was wrongfully obtained. Doc. 61. The response attached more
13 than 250 pages of exhibits. *Id.* The response did not, however, address the arguments
14 made in Defendants' motion for attorneys' fees (Doc. 55) or the deficiencies identified in
15 the Court's order denying the motion to strike (Doc. 54). *Id.*

16 Under Arizona law – which applies in this diversity action – a court “shall” award
17 attorneys' fees when an attorney unreasonably expands or delays the proceeding. A.R.S.
18 § 12-349(A)(3). Plaintiff's motion to strike unreasonably expanded and delayed the
19 resolution of this case by asserting numerous incorrect claims for sanctions. The
20 deficiencies were errors of fact and law that could have been avoided through reasonable
21 diligence by Plaintiff's attorney. *See* Docs. 41, 54. Because the motion to strike was
22 clearly baseless, and the errors were those that should have been avoided by counsel, the
23 Court concludes that Plaintiff's counsel unreasonably expanded and delayed this
24 proceeding and that Defendants are entitled to recover the reasonable attorneys' fees they
25 incurred as a result.

26 Defendants' motion for attorneys' fees includes an affidavit from lead counsel
27 concerning fees expended in opposing the motion to strike, an explanation of the hourly
28 rates charged for the response, and a spreadsheet describing by attorney, date, and subject

1 matter the work performed in responding to the motion. Doc. 56. Plaintiff's response
2 argues that the motion for attorneys' fees fails to comply with Local Rule 54.2, but that
3 rule by its terms applies to requests for attorneys' fees at the end of a case and not to fee
4 requests for violation of the Federal Rules of Civil Procedure. *See* LRCiv 54.2(a). The
5 Court's order denying Plaintiff's motion for sanctions found, among other errors, that it
6 violated Rule 11 of the Federal Rules of Civil Procedure. Doc. 54 at 2.

7 Upon review of Defendants' supporting materials, the Court concludes that the
8 \$385 hourly rate for associate David LaSpaluto and the \$175 hourly rate for paralegal
9 Heidi Kmoch are unreasonably high for the Phoenix market. The Court will reduce the
10 amounts awarded for the work of these individuals to \$250 and \$125 respectively. So
11 reduced, the total amount of fees reasonably incurred in responding to the motion to
12 strike is \$4,513.05. The Court will award this amount in favor of Defendants and against
13 Plaintiff's counsel Douglas C. Rhoads personally.

14 **IV. Attorneys' Fees Regarding Plaintiff's Unsuccessful Suit.**

15 Defendants argue that they are entitled to attorneys' fees incurred in defending
16 against this action pursuant to the plain terms of the Note, A.R.S. § 12-341.01, and
17 A.R.S. § 12-349. The Court does not agree.

18 Defendants are not entitled to a mandatory award of attorneys' fees under A.R.S.
19 § 12-349 because they have failed to prove the necessary elements. In order to obtain an
20 award of fees against a party who brings a claim without substantial justification, the
21 party requesting fees must prove by a preponderance of the evidence that the claim
22 constitutes harassment, *and* is groundless, *and* is not made in good faith. A.R.S. § 12-
23 349(F). The absence of even one element will preclude an award of fees. *Valles v. Pima*
24 *County*, 642 F. Supp. 2d 936, 957 (D.Ariz. 2009); *City of Casa Grande v. Arizona Water*
25 *Co.*, 20 P.3d 590, 598 (Ariz. Ct. App. 2001). Defendants' motion for attorneys' fees
26 argues that Plaintiff's suit was groundless and not made in good faith, but fails to show
27 that it was brought for purposes of harassment. Absent a showing of harassment, A.R.S.
28 § 12-349(A)(1) does not authorize an award of fees.

1 Defendants also fail to provide evidence that they are entitled to recover attorneys' fees under the Note. In order for the Note's attorneys' fees clause to have effect, the
 2 Note holder must first comply with the Notice of Default clause in the same paragraph.
 3 Doc. 59-1, ¶ 7(C), (E). Defendants have failed to provide any evidence showing that they
 4 complied with the Notice of Default clause and thus triggered the attorneys' fees clause.
 5 Doc. 8, ¶ 17.

6 Under A.R.S. § 12-341.01(A), a trial court has discretion in awarding fees and
 7 should consider several factors when making its decision. *Velarde v. PACE Membership*
 8 *Warehouse, Inc.*, 105 F.3d 1313, 1319-20 (9th Cir. 1997); *Associated Indemn. Corp. v.*
 9 *Warner*, 694 P.2d 1181, 1184 (Ariz. 1985) (en banc). Among these factors is whether a
 10 fee award "would cause undue hardship." *Wagenseller v. Scottsdale Mem'l. Hosp.*, 710
 11 P.2d 1025, 1049 (Ariz. 1985) (en banc); *Woerth v. City of Flagstaff*, 808 P.2d 297, 305
 12 (Ariz. Ct. App. 1990).

13 The Court concludes that an award of more than \$73,000 in fees and costs against
 14 Plaintiff would impose undue hardship. Plaintiff informed Defendants that without a
 15 settlement in this case she would file for bankruptcy. Doc. 62-1 at 2. Defendants have
 16 not provided evidence to show that Plaintiff has the ability to pay of fee award of more
 17 than \$73,000 without undue hardship.

18 **IT IS ORDERED:**

19 1. Defendants' motion for attorneys' fees related to Plaintiff's motion to strike
 20 (Doc. 55) is **granted in part** as set forth above. Defendants are awarded attorneys' fees
 21 of \$4,513.05 against Plaintiff's counsel Douglas C. Rhoads.

22 2. Defendants' second motion for attorneys' fees (Doc. 59) is **denied**.

23 Dated this 9th day of July, 2012.

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David G. Campbell
 United States District Judge